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SUPREME COURT OF THE UNITED STATES

SALIM AHMED HAMDAN

Petitioner,

v.

DONALD RUMSFELD ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For the District of Columbia Circuit

BRIEF OF BINYAM MOHAMED AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER (RE: TORTURE)

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INTEREST OF *AMICUS CURIÆ*[1]

Binyam Mohamed, *amicus curiæ*, is a citizen of Ethiopia who was a long-term resident of the United Kingdom of Great Britain and Northern Ireland, where he had sought political asylum. He is currently held in Guantánamo Bay, Cuba.

On December 12th, 2005, the "charging authority" referred Mr. Mohamed's case for military commission. He is therefore intimately concerned with the outcome of this case, yet he was charged too recently to have brought similar litigation on his own behalf.

Amicus was rendered to Morocco by United States personnel, acting on behalf of Respondents in this case, where he underwent unspeakable torture. The case against Mr. Mohamed was derived from this torture. *Amicus* strongly asserts his innocence of these charges, and his case presents in stark terms an extreme application of the principles at issue in this case.

CIRCUMSTANCES OF *AMICUS'* DETENTION AND TORTURE BY RESPONDENTS AND THEIR PERSONNEL

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amicus* states that no counsel for any party authored this brief in whole or in part, nor did any party to the action before the Court, or any person or entity other than the legal representatives of the undersigned *amicus*, make a monetary contribution to the preparation or submission of this brief.

Amicus presents the following facts[2] to persuade this Court of the dangers of allowing the Executive Branch untrammeled authority to hold prisoners based on evidence exacted through torture, without timely judicial review.

Binyam Mohamed was born on July 24, 1978, in Ethiopia. His father was a supervisor with Ethiopian Airlines. In 1992, during a governmental change, the military took over and began arresting people associated with the old government. Mr. Mohamed and his family fled to the United States, where *Amicus'* siblings were granted asylum. Mr. Mohamed's older brother and sister are now U.S. citizens. Mr. Mohamed moved with his father to Britain on March 9, 1994, and sought political asylum. Mr. Mohamed was given leave by the British government to remain in United Kingdom and lived in London for 7 years.

In the late Spring 2001, Binyam Mohamed left Britain to travel to Pakistan and later to Afghanistan. Mr. Mohamed who had recently converted to Muslim wanted leave Great Britain and travel to these Islamic countries to determine for himself whether they were truly adhering to Islamic principles. Mr. Mohamed also decided to leave Britain to escape and get away from his old drug life in England.

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[2] The facts of this case are derived from *Amicus'* version of his suffering. While *Amicus* strongly asserts the probity of what is presented below, he does not ask the Court to take his word for it. He only asks, in the age-old tradition of due process, that a Court be permitted to assess what is true and what is false.

When the war between the United States and the Taliban came to Afghanistan, Mr. Mohamed fled the country for his own safety. Mr. Mohamed wanted to return to the United Kingdom, but was arrested at the airport in Karachi on his attempt to fly to London. He was turned over to American custody.

A. *Amicus* was abused in Pakistan

Mr. Mohamed was imprisoned by the Pakistani authorities at the I.C.I. Unit, an interrogation center in Karachi, from April 20 to 27, 2002. Here agents who identified themselves as the FBI met with Mr. Mohamed. Mr. Mohamed refused to speak with the agents stating that the Americans had nothing to do with him. One of the agents told Mr. Mohamed that "The law has been changed. * * * You can cooperate with us -- the easy way, or the hard way."

Mr. Mohamed was held in a small cell and hung up by his wrist with a leather strap for about a week. This torture position is known as the *strappado* torture position.[3] Mr. Mohamed was allowed down from the *strappado* position twice a day for use of the toilet. He was given minimal amounts of food once every second day.

British intelligence agents came to speak with Mr. Mohamed. The British agents verified his claims and concluded that Mr. Mohamed was nobody of any significance. However, they indicated to Mr. Mohamed

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[3] *Strappado* is a name given to a torture method used by the Spanish Inquisition many centuries ago. Unfortunately, it is being used again in the Twenty-First Century.

that the Americans intended to take him to a country in Arabia, where he would be tortured. Sadly, this turned out to be true.

The FBI agents had somehow come to the conclusion that Mr. Mohamed was a major al Qaida agent. Mr. Mohamed informed the FBI that he was not al Qaida, that he had just recently converted to Islam and that the British had checked out and verified his story. Mr. Mohamed's answers were not what the agents were seeking, and the agents confirmed that they planned to send Mr. Mohamed to the Middle East for torture.

Pakistani military personnel began to enter Mr. Mohamed's cell and beat him with a leather strap. One Pakistani loaded a semi-automatic gun in front of Mr. Mohamed and pointed it at his chest. As Mr. Mohamed describes it, "he pressed it against my chest" and "he just stood there. I knew I was going to die. He stood like that for five minutes. I looked into his eyes, and I saw my own fear reflected there. I had time to think about it. Maybe he will pull the trigger and I will *not* die, but be paralyzed. There was enough time to think the possibilities through."

B. *Amicus* was rendered to Morocco for 18 months of torture by Respondents

On July 19th, 2002, Mr. Mohamed was taken from Karachi to Islamabad. After being held for two

days in Islamabad, he was rendered to Morocco by the U.S. and was tortured.[4]

Once in a Morocco prison, Mr. Mohamed was interrogated. Most of those who questioned him were Moroccans. One interrogator, a woman identifying herself as Sarah, said she was Canadian, but Mr. Mohamed believed her to be American. The Moroccan interrogators told Mr. Mohamed that the U.S. had a story they wanted from him, and it was the Moroccans' job to get it.

Mr. Mohamed describes his first few days in Morocco as merely observational. His captors would ask a few questions, and Mr. Mohamed would talk with the guards. However, Mr. Mohamed knew he was in the Morocco prison to be tortured. At one point he asked one of his captors what they had in store for him, and was told: "[T]hey'll come in wearing masks and beat you up. They'll beat you with sticks. They'll rape you first, then they'll take a glass bottle, they break the top off and make you sit on it." Mr. Mohamed looked in the eyes of the man who made this statement and saw the certainty that they *were* going to do what he said.

Initially, Mr. Mohamed obstinately refused to say what they wanted to hear. The woman who identified herself as Sarah came to talk to him, saying

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[4] There are published media reports that provide corroboration for *Amicus'* version of events, insofar as a CIA plane flew from Islamabad, Pakistan, to Morocco on precisely the date identified by *Amicus*, and another CIA plane flew from Morocco to Kabul, Afghanistan, on precisely the day identified by *Amicus* for his return.

she was an impartial 'third party' from Canada. Sarah told Mr. Mohamed: "If you don't talk to me, then the Americans are getting ready to carry out the torture. They're going to electrocute you, beat you, and rape you." She seemed blasé about this, as if this were something normal. Mr. Mohamed told her that he knew nothing, so he had nothing that he could say to her or anyone.

'Sarah' visited on various occasions, but the night she left for the last time, the Moroccan guards entered Mr. Mohamed's cell and cuffed his hands behind his back. Three masked men wearing black masks came into the cell. Mr. Mohamed recalls: "when they came in my head stopped. I ceased really knowing I was alive. * * * One stood on each of my shoulders, and the third punched me in the stomach. The first punch, I didn't expect it. I didn't know where it would be. I'd have tensed my muscles but I didn't have time. It turned everything in me upside down."

Mr. Mohamed states that the abuse seemed to go on for hours. Every time he fell to the ground, they would pull him back up and hit him some more, kicking him as they forced him back up. He vomited within the first few punches. Then he simply prayed for it to end.

The next night the torture continued but this time there was also interrogation. His captors would ask a question and when he responded, the captors would say it was a lie and hit him. Mr. Mohamed would say something else, and they would hit him again, saying that too was a lie. Mr. Mohamed could

not work out what they wanted to hear. They would say there was someone who had identified Mr. Mohamed as a big man in Al Qaida. Mr. Mohamed would say this was false. They would beat him some more. He would say, "Okay it's true." They would order him to tell them more. He would say that he did not know any more. They would beat him again.

Mr. Mohamed tells how later "that night the same people came back. The same guy punched me till I couldn't stand. I was making noises, groaning, I couldn't breathe, I begged them to stop. They didn't care."

At this stage, Mr. Mohamed was about a month into his sojourn in Morocco. There was a lull. Then, after a few days, he was moved to another cell. The guards hung Mr. Mohamed up by his ankles and left him to contemplate what was coming. Next, a Moroccan torturer who called himself Marwan entered the cell and demanded Mr. Mohamed's entire story over again. Whatever Mr. Mohamed said was not good enough and he was tortured some more. Marwan stood there smoking cigarettes while the masked goons beat him. The masked men entered his cell on four separate occasions that night and beat him savagely.

For a few days, again he was left alone. As he waited in his cell, Mr. Mohamed could hear the screams of others being abused in the cell block. When Marwan came back in, initially Mr. Mohamed placated him by agreeing to say whatever was asked of him. Unfortunately, Mr. Mohamed somehow angered his abuser, and this is when his situation took another turn for the worse.

Marwan ordered the three masked men to strip Mr. Mohamed. The masked men cut off Mr. Mohamed's clothes with some type of doctor's scalpel. As Mr. Mohamed stood before his torturers totally naked, he did not know what was coming. He thought that maybe he would be raped, electrocuted, or castrated.

The masked men first used the scalpel to slash a small, one-inch cut on Mr. Mohamed's right chest. Mr. Mohamed recalls screaming because the pain was so sudden. Next, they cut him on the left side of his chest. He resisted screaming this time, as he knew the cut was coming. This appeared to agitate Marwan all the more. "One of them took my penis in his hand and began to make cuts," reports Mr. Mohammed. "He did it once, and they stood still for maybe a minute, watching my reaction. I was in agony, crying . . . I was screaming."

This appalling abuse went on for perhaps two hours, and Mr. Mohamed's penis was cut 20 or 30 times. There was blood all over the place.

This torture procedure was frequent at first, and then took place every three or four weeks. The men would enter the cell, tie him up, and spend about an hour cutting small slashes in his penis. They would do it slowly and deliberately. One man would make a cut, and then would smoke a cigarette, talking to the others in some Moroccan dialect that he could not catch. Then another would take his turn. They never addressed a word to him. Mr. Mohamed describes how they would tip some kind of liquid on the cuts. The burning was like grasping a hot coal, but not with your hands.

At one point, Mr. Mohamed asked a guard why they were willing to do America's torture, and the guard said: "America's really pissed off at what happened, and they've said to the world, either you're with us or you're against us. We Moroccans say we're with you. So we'll do whatever they want."

When Mr. Mohamed asked another guard what the point of the torture was as he was willing to say anything and everything they wanted, the guard told him: "As far as I know, it's just to degrade you. So when you leave here, you'll have these scars and you'll never forget. So you'll always fear doing anything but what the U.S. wants."

Meanwhile, as the physical torture continued the psychological torture began, with loud music and noise, along with the forced administration of drugs, for months on end.[5]

C. *Amicus* is tortured in Afghanistan for 9 months by Respondents' agents.

After spending 18 months in Morocco, Mr. Mohamed was rendered to Afghanistan for an additional five months of torture in an Afghan institution known as the 'Dark Prison'. Mr. Mohamed was transported to Kabul in another U.S. aircraft.

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[5] This brief does not make mention of the worst of what happened to Mr. Mohamed in Morocco. Mr. Mohamed went through torture that was even more humiliating that he simply is unwilling to have discussed in public.

The psychological torture continued in the 'Dark Prison' from January 22nd, 2004 to late May. Mr. Mohamed was held in truly Dickensian conditions in the Kabul 'Dark Prison'. He was in pitch darkness most of the time, surrounded by loud music, and then loud horror sounds, for 24 hours a day. Here, his abusers identified themselves as being with the CIA.

Mr. Mohamed was chained up for two weeks because he made the mistake of recanting the statements tortured out of him in Morocco, thinking the CIA interrogators would accept that he had been forced to agree to these falsehoods.

In May 2004, Mr. Mohamed was taken from the 'Dark Prison' in Kabul to Bagram Air Force Base. He underwent further abuse there, before being sent to Guantanamo Bay, Cuba, in September. This is where he is currently imprisoned, facing charges before a military commission. In June 2005 President Bush apparently designated Mr. Mohamed as eligible to be tried in such a commission.[6]

D. *Amicus* now faces judgment by a military commission that has been described as 'rigged' by military prosecutors assigned to conduct the commission.

Mr. Mohamed insists that the torture described above (and much more) was used to make him agree to

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[6] *Amicus* played no role in this process of designation, and neither he nor his counsel has had access either to the factual basis for this finding, or to the finding itself.

the false statements that the Americans demanded from him, and that are now being used to support his incarceration. He insists that he is innocent of any crime[7] and that all charges against him are false. Respondents suggest that any issue of innocence, torture, and so on can only be discussed in, and decided by, the military commissions that Respondents set up, without recourse to any Article III court.

Many have criticized the military commissions. The rules were created, seemingly out of whole cloth, in the wake of September 11, 2001. Many of the 'crimes' are *ex post facto*; the tribunals are comprised of hand-picked military officers; secret evidence can be used, as well as statements exacted through torture and coercion;[8] and there is a notable absence of other due process procedures.

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[7] *Amicus* does not address the issue of the 'crime' charged against him here, but it is worth noting that the 'crime' of conspiracy that is defined in the military instructions is unlike any 'war crime' that has ever been recognized in international law, and consequently suffers from a plethora of legal defects. Presumably under Respondents' theory there would be no judicial review of these issues either.

[8] As General Hemingway made clear at an August 2005 press briefing, evidence may be admitted if it has 'probative value', even if it has been exacted through coercion:

> Q: Two quick ones. Am I correct the three -- ones I outlined: probative value, whether something was obtained through coercion, no appeal outside this insulated -- (inaudible) -- all those things still exist, those things that were the objects of criticism?

Military prosecutors (hand-picked to conduct the military commissions) have resigned rather than be involved in proceedings that they have said are "rigged to convict":

> Among the striking statements in the prosecutors' messages was an assertion by an Air Force officer that the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants would be "handpicked" to ensure that all would be convicted.
>
> The same officer, Capt. John Carr, also said in his message that he had been told that any exculpatory evidence - information that could help the detainees mount a defense in their cases - would probably exist only in 10 percent of documents being withheld by the Central Intelligence Agency for security reasons.
>
> Captain Carr's e-mail message also said that

> Gen. Hemingway: Well, as far as probative value, I've discussed that in the media many times. We have not changed that. And quite frankly, I don't see any reason to do so.

DoD News Briefing, Legal Advisor to the Appointing Authority for Military Commissions, Brig. Gen. Thomas L. Hemingway, Wednesday, August 31, 2005 - 1:01 p.m. EDT. [http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html]

some evidence that at least one of the four defendants had been brutalized had been lost and that other evidence on the same issue had been withheld. The March 15, 2004, message was addressed to Col. Frederick L. Borch, the chief prosecutor who was the object of much of Captain Carr's criticism.

The second officer, Maj. Robert Preston, also of the Air Force, said in a March 11, 2004, message to another senior officer in the prosecutor's office that he could not in good conscience write a legal motion saying the proceedings would be "full and fair" when he knew they would not.

* * *

In his March 2004 message, Captain Carr told Colonel Borch that "you have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and we only needed to worry about building a record for the review panel" and academicians who would pore over the record in years to come.

Captain Carr said in the message that the problems could not be dismissed as personality differences, as some had tried to depict them, but "may constitute dereliction of duty, false official statements or other criminal conduct."

He added that "the evidence does not

indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of the accused or the sustainability of our efforts." The office, he said, was poised to "prosecute fairly low-level accused in a process that appears to be rigged."

In addition, the captain also stated in his message that Colonel Borch also said that he was close to Maj. Gen. John D. Altenburg Jr., the retired officer who is in overall charge of the war crimes commissions, and that this would favor the prosecution.

General Altenburg selected the commission members, including the presiding officer, Col. Peter S. Brownback III, a longtime close friend of his. Defense lawyers objected to the presence of Colonel Brownback and some other officers, saying they had serious conflicts of interest. General Altenburg removed some of the other officers but allowed Colonel Brownback to remain.

In his electronic message, Captain Carr said the prosecution team had falsely stated to superiors that it had no evidence of torture of Ali Hamza Ahmed Sulayman al-Bahlul of Yemen. In addition, Captain Carr said the prosecution team had lost an F.B.I. document detailing an interview in which the detainee claimed he had been tortured

and abused.

> Major Preston, in his e-mail message of March 11, 2004, said that pressing ahead with the trials would be "a severe threat to the reputation of the military justice system and even a fraud on the American people."[9]

Predictably, these kinds of statements have had a devastating impact on public perceptions of the commissions. The United States' closest ally, Britain, has publicly and emphatically stated that the commissions fail to meet minimum due process standards and insisted that all her citizens be returned to face adequate procedures at home.[10] A highly

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[9] *See* Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, New York Times (August 1, 2005) ("Copies of the e-mail messages were provided to The Times by members of the armed forces who are critics of the military commission process. The documents' authenticity was independently confirmed by other military officials."). A third prosecutor has also resigned rather than take part in this process. *See* Leigh Sales, *Third Prosecutor Critical of Guantanamo Trials*, Australian Broadcasting Corporation (Aug. 3, 2005), at http://www.abc.net.au/news/newsitems/200508/s1428749.htm.

[10] British Foreign Secretary Jack Straw has said, "in the [UK] Attorney General's view the Military Commissions, as presently constituted, would not provide the type of process which we would afford British nationals." Foreign and Commonwealth Office, Statement by the Foreign Secretary on Return of British Detainees (19th February, 2004).

respected member of the British judiciary, Lord Steyn, has referred to the proceedings as a 'kangaroo' court.[11]

The tribunal members, apparently hand-picked by Respondents, and a Review Panel similarly chosen, provide the 'legal process' that Respondents would have determine *Amicus'* claim that he has been tortured by Respondents' agents, the question of his criminal culpability, and whether he is an enemy combatant.

The Executive Branch cannot claim authority to establish such commissions from any legitimate source.

SUMMARY OF ARGUMENT

Amicus' case illustrates what one hopes is an extreme, where a prisoner is held based on evidence exacted at the tip of a razor blade. Yet it is the extreme case that illustrates the flaws in Respondents' argument. *Amicus* submits the President has never been empowered to establish procedures – whether in military commissions, or whether by denying judicial review in the context of the Geneva Conventions – where a prisoner may be held based on such evidence, with no judicial review.

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[11] Lord Steyn said that "the military commissions are not independent courts or tribunals. The term kangaroo court springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgement by an irregular tribunal which makes a mockery of justice." Lord Johan Steyn, *Guantanamo: The Legal Black Hole*, 27th F.A. Mann Lecture (25th November 2003).

Amicus respectfully submits that this Court should preserve the judiciary's vital and complementary role to insure that executive actions do not violate the Constitution of the United States of America, international humanitarian law, as well as the international standards of human rights under the rule of law by which the United States is bound and to which the United States must remain intimately committed.

ARGUMENT

I. NEITHER CONGRESS' AUTHORIZATION FOR THE USE OF MILITARY FORCE (AUMF, PUB. L. NO. 10740, 115 STAT. 224), THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ) NOR THE INHERENT POWERS OF THE PRESIDENT ALLOW FOR A PROCESS THAT INVOLVES THE USE OF EVIDENCE DERIVED FROM TORTURE.

In the emotional wake of September 11, 2001, the Authorization for the Use of Military Force (AUMF) was adopted with considerable expedition, and without much debate.

One matter that must have been implicit to everyone involved, however, was that the AUMF did not authorize President Bush to establish tribunals that conflicted with the most basic of American traditions – the very liberties that the use of military force might protect.

A. The United States has a long and hallowed antipathy towards torture

There are many ways in which the U.S. has repeatedly signaled its opposition to the use of torture.

First, there are congressional statements and records. The recently passed McCain Amendment requires that U.S. interrogators only use techniques approved in the United States Army Field Manual on Intelligence Interrogation and that no individual in the custody of or under the physical control of the U.S. government be subject to cruel, inhuman or degrading treatment or punishment.[12] The McCain amendment passed in the Senate on October 5th 2005 by a vote of 90-9[13] and the House of Representatives followed suit, voting 308-122 to instruct House negotiators to include the amendment in the final act.

Senator McCain advanced three basic arguments in favor of the law. First, subjecting prisoners to abuse leads to bad intelligence; second, mistreatment of prisoners endangers U.S. troops who may be captured in future wars; and third, "prisoner abuses exact on us a terrible toll in the war of ideas". Each of these arguments against torture has been accepted as persuasive through generations of American military practice. In a letter to Senator McCain of September

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[12] S.AMDT. 1977 to H.R. 2863 (Department of Defense Appropriations Act, 2006).

[13] Nine senators voted against the amendment but none amongst them suggested that torture was an acceptable interrogation technique. Senator Ted Stevens, who led the argument against the amendment, explicitly supported the aims of the McCain amendment. THOMAS at p. S11064 http://thomas.loc.gov/cgibin/query/F?R109:1:./temp/~R109D1QYJJ:E2854.

2005 a large number of distinguished retired military officers approved the amendment noting that the existing Army Field Manual "applies the wisdom and experience gained by military interrogators in conflicts against both regular and irregular foes" and as reflecting "the experience and highest traditions of the US military".[14]

It is perhaps unsurprising that no senator has spoken in defense of torture. Senator Kennedy noted with pride that the International Red Cross called U.S. compliance with the Geneva Conventions during the first Gulf War "the best of any nation in any conflict in the history of the Conventions," and it is doubtful that any legislator would wish the U.S. to disown or diminish such a moral tradition.[15]

Second, the U.S. has also signaled opposition to torture through judicial statements and case law both from United States courts and courts abroad. From the earliest days of the common law, torture has been firmly rejected, as the British Law Lords recently explained in *SSHD v. A* [2005] UKHL 71:

> It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture. Its rejection of this practice was indeed hailed as a distinguishing feature of the common law, the subject of proud claims by English jurists such as Sir John Fortescue (De Laudibus

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[14] Id. at S11063.

[15] Id. at S11075.

Legum Angliae, c. 1460-1470, ed S.B. Chrimes, (1942), Chap 22, pp 47-53), Sir Thomas Smith (De Republica Anglorum, ed L Alston, 1906, book 2, chap 24, pp 104-107), Sir Edward Coke (Institutes of the Laws of England (1644), Part III, Chap 2, pp 3436). Sir William Blackstone (Commentaries on the Laws of England (1769) vol IV, chap 25, pp 320-321), and Sir James Stephen (A History of the Criminal Law of England, 1883, vol 1, p 222). * * * The English rejection of torture was also the subject of admiring comment by foreign authorities such as Beccaria (An Essay on Crimes and Punishments, 1764, Chap XVI) and Voltaire (Commentary on Beccaria's Crimes and Punishments, 1766, Chap XII). This rejection was contrasted with the practice prevalent in the states of continental Europe who, seeking to discharge the strict standards of proof required by the Roman-canon models they had adopted, came routinely to rely on confessions procured by the infliction of torture. In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice.[16]

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[16] Opinion of Lord Bingham, at para. 11 (citations

As Jardine put it:

> "As far as authority goes, therefore, the crimes of murder and robbery are not more distinctly forbidden by our criminal code than the application of the torture to witnesses or accused persons is condemned by the oracles of the Common law."[17]

That this is true of our own law should need no citation to authority,[18] and civilized nations are unanimous that torture is abhorrent -- including Ireland,[19] Canada,[20] the Netherlands,[21] France,[22] and even Israel, a U.S. ally that has

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omitted).

[17] D. Jardine, A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth, at 13 (1837).

[18] See, e.g., *LaFrance v Bohlinger*, 499 F.2d 29 (1st. Cir. 1974) ("It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest to bolster its case...methods offensive when used against an accused do not magically become any less so when used against a witness.")

[19] *The People (Attorney General) v O'Brien* [1965] IR 142, 150 ("to countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement.").

[20] *R v Oickle* [2000] 2 SCR 3 at para. 66 ("What should be repressed vigorously is conduct on [the authorities'] part that shocks the community").

[21] *Pereira*, 1 October 1996, nr 103.094, para 6.2.

[22] *Le Ministère Public v Irastorza Dorronsoro*, Cour d'Appel de Pau, No 238/2003, 16 May 2003 (extradition to

lived on the frontline of the war on terror for many years.[23]

The European Court of Human Rights, encompassing 46 states, held in *Chahal v United Kingdom* (1996) 23 EHRR 413, para 79:

> Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

Spain was refused where allegations that a witness statement had been procured by torture in Spain was judged not to have been adequately answered).

[23] *Public Committee Against Torture in Israel v Israel* (1999) 7 BHRC 31, para 39 ("Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.").

Clearly, judicial statements and case law soundly oppose the use of torture.

Third, recent executive statements have also opposed the use of torture. While the Bush administration received strong criticism of its early failure to endorse the McCain amendment, the administration at no time argued that torture should be acceptable Indeed, President Bush said in 2004:

> Today, on United Nations International Day in Support of Victims of Torture, the United States reaffirms its commitment to the worldwide elimination of torture. The non-negotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution,

> Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees.[24]

Hence, even the current executive administration realizes and advocates the fundamental rights to prohibit the use of torture.

Fourth, U.S. international treaty obligations oppose the use of torture. For example, a Committee against Torture was established under article 17 of the Torture Convention to monitor compliance by member states. The Committee has recognized a duty of states to investigate where allegations of torture are made.[25]

Fifth, statements by Americans military personnel provide additional weight opposing the use of torture. U.S. servicemen have been clear that they do not want to work with methods that undermine the values they fight for and therefore undermine their dignity as

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[24] Available at <HTTP://WWW.WHITEHOUSE.GOV/NEWS/RELEASES/2004/06/20040626-19.HTML> (last visited 17 December 2005).

[25] *PE v France*, 19 December 2002, CAT/C/29/D/193/2001, paras 5.3, 6.3; *GK v Switzerland*, 12 May 2003, CAT/C/30/D/219/2002), para 6.10. The UN Security Council, of which the U.S. is a veto holding member, reminded states in resolution 1566 of 8 October 2004 "that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, and in particular international human rights, refugee and humanitarian law."

soldiers. The Navy League of the United States wrote a letter to the Chairman of the House Appropriations Subcommittee on Defense to express support for the Senate versions of H.R. 2863 (the Defense Appropriations Act of Fiscal Year 2006). The letter states that "America's hard-earned reputation for respect of the rule of law and human dignity is an inherent part of our greatness as a Nation" but also that the world will judge America by its actions which must be consistent with that reputation.

Perhaps the most eloquent expression of these sentiments is that of the letter from Captain Fishback of the 82nd Airborne Division, a veteran of combat in both Afghanistan and Iraq, who writes:

> "If we abandon our ideals in the face of adversity and aggression, then those ideals were never really in our possession. I would rather die fighting than give up even the smallest part of the idea that is America".[26]

Sixth, statements and records by other U.S.

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[26] HTTP://WWW.WASHINGTONPOST.COM/WP-DYN/CONTENT/ARTICLE/2005/09/27/AR2005092701527.HTML. See also *Army Field Manual 34-52 Chapter 1* ("US policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment as a means of or aid to interrogation"; "use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear").

officials including the State Department, human rights reports, and U.S. intelligence agencies oppose the use of torture and unreliable evidence that results from torture. For example, consider the statement of Army Colonel Stewart Herrington, a military intelligence specialist who conducted interrogations in Vietnam, Panama and during the first Gulf War: "torture is simply not a good way to get information". Many will talk without being subjected to torture, and those who are tortured will say anything to make it stop.[27]

B. It is inconceivable that the United States Congress would have sanctioned the use of evidence exacted at the tip of a razor blade in ceding authority to the Executive Branch

The AUMF does not address the administration of criminal justice for suspected terrorists, explicitly or implicitly. Instead, as its introductory clauses make clear, the AUMF focuses on a Nation's right to effective self-defense. The AUMF does not support or advocate torture. Moreover, as we have clearly seen, the U.S. is firmly set against torture. Therefore, the idea that Congress would have allowed or expected the Respondents to use torture-induced evidence before a military commission is difficult to accept.

By their actions, Respondents have attempted to assert the right to create a military commission system that violates a plethora of due process principles – including, in *Amicus'* case, using evidence against him

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[27] http://www.washingtonpost.com/wp-dyn/articles/A2302-2005Jan11.html

derived from torture. Such an arrangement certainly was not authorized by Congress. Respondents' argument must fail.

II. IT IS INCONCEIVABLE THAT THE UNITED STATES ADOPTED THE 1949 GENEVA CONVENTION ALLOWING *AMICUS* TO BE HELD BASED ON EVIDENCE EXACTED THROUGH TORTURE YET PRECLUDING ANY WRIT OF HABEAS CORPUS CHALLENGING THE LEGALITY OF HIS DETENTION

In 2002, then-Secretary of State Colin Powell initially suggested that the Geneva Conventions should apply to the combat in Afghanistan.[28] So did many others, including the overwhelming majority of foreign commentators.

When it comes to whether the Conventions apply to *Amicus*, Respondents seek the right to unilaterally interpret the Conventions however they see fit, even to

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[28] See *Memorandum for the President from Alberto R. Gonzales regarding "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban"*, at 1 (January 25, 2002) ("The Secretary of State has requested that you reconsider that decision [to deny Geneva Convention III treatment to the prisoners]. Specifically he has asked that you conclude that GPW does apply to both al Qaeda and the Taliban. I understand, however, that he would agree that al Qaeda and Taliban fighters could be determined not to be prisoners of war (POWs) but only on a case-by-case basis following individual hearings before a military board.").

the extent of holding a prisoner on the basis of evidence that has been tortured out of him, or someone else. Respondents want to avoid all judicial supervision of their actions. This cannot have been Congress' intention at the time the Conventions were adopted.

After the Second World War, the law of war was codified in the four Geneva Conventions, which have been ratified by more than 180 nations, including the United States.

At the time that the Geneva Conventions were adopted, there was a very recent history of using courts to enforce proper respect and interpretation for the law of war. When a rogue state refuses to respect the Geneva Conventions and actually resorts to torture, there must be some mechanism for the law to be enforced. In the wake of World War II, there were several trials that involved savagery by the enemies of the U.S., and the laws of war that preceded the Geneva Conventions were used to bring such prisoners to justice.[29]

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[29] *In re Yamashita*, 327 U.S. 1, 66 S. Ct. 340, 347 (1946) (charging that Yamashita "failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines"); *Trial of Lieutenant General Harukei Isayama and Others*, Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission, Volume VI, 60 (Japanese soldiers charged with "wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American Prisoners of War, by

In 1996, Congress enacted the War Crimes Act, which defined "war crimes" in reference to the Geneva Conventions as well as other international agreements. See *18 U.S.C. §2441(c)*. The War Crimes Act provides for judicial enforcement of severe penalties for commission of war crimes, including the death penalty. See *§ 2441(a)*.

Meanwhile, in civil cases, the Geneva Conventions have been read as providing a private cause of action.[30] Indeed, based on the Geneva Conventions and their incorporation into the War Crimes Act of 1996, the courts have held that there is a customary international law norm against attacks against civilians as war crimes.[31]

Given this history of the Conventions, it makes little sense for Respondents to argue that the Congress, in ratifying the Conventions, meant to grant the President unbounded power to escape judicial review and allow and encourage the use of torture. Far from it. Such abuses of the Conventions themselves must be enforceable in the courts.

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permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war.").

[30] *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995); *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164 (C.D.Cal. 2005); *Mehinovic v Vuckovic*, 198 F.Supp.2d 1322 (N.D.Ga. 2002).

[31] *See In re Agent Orange*, 373 F.Supp.2d 7, 2005 WL 729177 at *95-96, 112-13 (E.D.N.Y. 2005); *see also Kadic*, 70 F.3d at 242-43.

CONCLUSION

The decision of the Court of Appeals should be reversed, with directions that the writ of habeas corpus should be granted.

Respectfully submitted,

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